Supreme Court, U.S.
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No. 96-474

IN THE

Supreme Court of the United States

October Term, 1995

PACIFIC LUMBER COMPANY,
Petitioner,

v.

MARBLED MURRELET (Brachyramphus marmoratus), and ENVIRONMENTAL PROTECTION INFORMATION CENTER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for all parties and the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation affecting the public interest. PLF was founded in 1973, has over 20,000 members, contributors, and supporters located throughout the Country, and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF's public policy perspective and litigation experience will provide an additional viewpoint of the issues presented. PLF has participated in numerous cases involving the interpretation of environmental statutes, including the federal Endangered Species Act. For example, PLF was a party of record in *Pacific Legal Foundation v. Andrus,* 657 F.2d 629 (6th Cir. 1981), and PLF participated as amicus curiae in this Court in *Bennett v. Spears,* Sup. Ct. No. 95-813; *Douglas County, Oregon v. Babbitt,* Sup. Ct. No. 95-371; *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon,* ___ U.S. ___, 115 S. Ct. 2407 (1995); *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978).

Many PLF supporters live within the purported marbled murrelet habitat along the Pacific Coast and are directly affected by the Ninth Circuit's decision in this case. A critical issue before this Court is whether the government can conscript private property into public service, by prohibiting otherwise lawful land uses, without a showing that those uses will result in actual injury or death to any protected wildlife species. The Ninth Circuit held that the Endangered Species Act grants the government such power over the use of private property.

This ruling creates uncertainty and jeopardizes the property rights of rural and agricultural land owners by expanding habitat protection beyond that authorized by the Act and contravening this Court's precedent in *Babbitt v. Sweet Home*. In that case, this Court upheld the regulatory definition of harm that included habitat modification that actually injures or kills a protected species. Use of private property that results in habitat modification but does not result in actually killing or injuring a protected species is not prohibited. *Sweet Home*, 115 S. Ct. at 2412-13. The lower court decision upsets the careful balance recognized in *Sweet Home* between private rights and wildlife protection by allowing the federal government to restrict the use of private property upon speculation that the property might be used in the future by protected species for breeding, feeding, or shelter.

Review by this Court is necessary, therefore, to avoid confusion, maintain the integrity of the Endangered Species Act, and to resolve the conflict between the Ninth Circuit decision and this Court's holding in *Babbitt v. Sweet Home*.

STATEMENT OF THE CASE

The principal issue in this case is whether modification of potential habitat, without proof of actual harm to individual animals, would be an unlawful "take" of a threatened species. In ruling Pacific Lumber Company's proposed timber harvest would unlawfully "take" marbled murrelet, because cutting some trees may impair future breeding, Petition for Writ of Certiorari (Pet. for Writ.) Appendix (App.) A at 16a, the Ninth Circuit caused great confusion over what level of habitat modification can constitute an unlawful "take." Although state and federal wildlife agencies in this case found that extreme mitigation measures imposed on the petitioner's harvest would avoid any "take," the Ninth Circuit ruled that a likelihood of future harm from modification of potential breeding habitat nevertheless violates the Act's "take" prohibition. By so ruling, the Ninth Circuit created a revolutionary standard which so expands the definition of "take" as to jeopardize the economic use of all private land that is, or may potentially be, suitable habitat for a protected species.

The marbled murrelet is a small seabird about the size of a robin. Pet. for Writ. at 2. The bird spends the vast majority of its life at sea and flies inland for breeding purposes only. The murrelet nests in stands of mature and old-growth timber up to 10 miles from the coast during the fall and winter months. The marbled murrelet is listed under the Federal Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, as "threatened" throughout its range in Washington, Oregon, and California, although it is not listed in Alaska where it has a large population. Pet. for Writ. at 2.

A "threatened species" is a species that is likely, within the foreseeable future, to be in danger of extinction through all or

a significant portion of its range. 16 U.S.C. § 1532(6); (16). Once a species has been formally listed pursuant to 16 U.S.C. § 1533, the Endangered Species Act prohibits, among other things, the "taking" of members of the species. 16 U.S.C. § 1538, 50 C.F.R. § 17.31(a). By regulation, this includes a prohibition on habitat modification that will actually injure or kill a member of the species. 50 C.F.R. § 17.3.

Pacific Lumber Company initially proposed a timber harvest on a 237-acre portion of its privately owned 440-acre Owl Creek Forest in Southern Humboldt County. In order to harvest private commercial timber in California, a timber company must submit a timber harvest plan to the California Department of Forestry and Fire Protection for approval under California Public Resources Code § 4511, *et seq.* In order to gain approval, Pacific Lumber Company agreed to extreme mitigation measures to ensure that the marbled murrelet would not be harmed. Initially, it conducted extensive murrelet surveys which it shared with public agencies including the California Department of Fish and Game so that a plan could be developed that would ensure murrelet would not be taken. As a result, the size of the harvest area was reduced to 137 acres where harvesting activities were restricted to only 40% to 60% of the trees. Harvesting activities were prohibited during the marbled murrelets' nesting season and, accordingly, allowed only when the birds are at sea so that neither the birds nor their potential nesting activities would be harmed. Twenty-three acres of old-growth mitigation zones were created--areas where harvesting was prohibited. Additional harvesting is prohibited within the 237-acre proposed harvest area as long as the murrelet is listed by either the state or federal government as a protected species or until there is a federally approved marbled murrelet management plan or habitat conservation plan. With these assurances that the marbled murrelet would not be harmed, state authorities approved the timber harvest.

It was this extremely limited governmental permission for harvesting trees on Pacific Lumber's own land that precipitated this lawsuit. The plaintiff Environmental Protection Information Center (EPIC) brought a citizen's suit under Section 11 of the Endangered Species Act, 16 U.S.C. § 1540(g), and sought to permanently enjoin the implementation of the harvest plan contending that the 137-acre harvest site is marbled murrelet nesting habitat. Pet. for Writ. at 3.

After an eight-day trial, without any proof of actual injury, the court issued its decision finding that modification of habitat through the proposed harvest "will sufficiently 'harm' ... the marbled murrelet so as to constitute a 'take' of the species." Pet. for Writ. App. C at 39a. The court permanently enjoined petitioner Pacific Lumber Company from implementing the harvest plan and the appeal to the Ninth Circuit ensued.

On review, the Ninth Circuit affirmed the judgment of the District Court but, unlike the lower court, analyzed the issue within the context of this Court's recent ruling in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*. However, in reaching its holding, the Ninth Circuit has caused great confusion among property owners and even governmental agencies as to what action property owners can and cannot take on their land without it constituting an illegal habitat modification. In *Sweet Home*, this Court issued repeated warnings that habitat modification can only result in a "take" if the changed habitat results in actual injury or death to members of a protected species. Yet the Ninth Circuit appeared to say there need be no showing that injury or death will occur, only that habitat modification may significantly impair breeding, feeding, or sheltering of a protected species. Thus, the Ninth Circuit ruling (1) nullifies the critical modifying terms of 50 C.F.R. § 17.3, to "injure or kill," (2) misinterprets this Court's reasoning in *Sweet Home*, and (3) undermines the constitutional protection of private property by introducing

inconsistent standards. Without question, the Ninth Circuit's ruling has created great uncertainty on the part of property owners as to what they can do with their land without violating the Endangered Species Act. Review should be granted to resolve these serious questions.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision muddles this Court's holding in *Sweet Home* by finding habitat modification that significantly impairs the breeding and sheltering of a protected species is a "take." However, under *Sweet Home*, unless the habitat modification causes the actual injury or death of one or more members of the protected species, rather than just affecting the species' future population, the "take" prohibition of the Endangered Species Act is not violated.

The Ninth Circuit's decision leaves property owners to wonder how they can use their property, if at all, in compliance with the law. This uncertainty undermines the concept of ordered liberty and erodes trust in the government. The Ninth Circuit's decision should be reviewed and overturned to restore a regulatory regimen that gives property rights meaning and certainty.

ARGUMENT

I

THE NINTH CIRCUIT'S DECISION HAS CREATED GREAT CONFUSION WITH THIS COURT'S SWEET HOME DECISION AND THEREFORE SHOULD BE REVIEWED

A. The Sweet Home Decision

On June 29, 1995, this Court decided *Sweet Home*, a case challenging the facial validity of the Fish and Wildlife Service's species protection regulation. 50 C.F.R. § 17.3. This regulation applies to all land use activities that have any potential to significantly modify endangered or threatened species' habitat.

The Fish and Wildlife Service had been applying Section 17.3 to prohibit landowners from developing or otherwise using their lands in ways that would modify the habitat of protected species unless the landowner first obtained the service's approval. Such approval is generally obtained, if at all, only after the landowner agrees to significant land devaluing mitigation measures. *See* 16 U.S.C. § 1539(a); 50 C.F.R. § 17.22.

Facially, this regulation appeared to restrict only those land use activities that cause death or injury to protected species. In practice, however, the Fish and Wildlife Service had aggressively regulated habitat modification pursuant to this rule regardless of the modification's actual impact on protected

species.[1] As a result, the ability of many landowners to use their property in a reasonable and profitable manner had been severely restricted. Believing the Endangered Species Act was never intended to give the Fish and Wildlife Service such broad land use control authority, "small landowners, logging companies, and families dependent on the forest products industries" sued for declaratory relief to clarify the reach of the law. *Sweet Home*, 115 S. Ct. at 2410.

Section 9 of the Endangered Species Act, 16 U.S.C. § 1538, generally identifies what acts are prohibited under the Act. Section 9(a)(1) provides, with certain exceptions, that "it is unlawful for any person ... to ... *take* any such species within the United States or the territorial sea of the United States." 16 U.S.C. § 1538(a)(1)(B) (emphasis added).

Section 3(19) of the Act defines the term "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

In 1975, the Interior Department promulgated a regulation interpreting the statutory term "harm" as used in Section 3(19):

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[1] For example, in June, 1991, the Fish and Wildlife Service in Jacksonville, Florida, sent letters to 550 ranchers, farmers, and homeowners identified through county records as "owning property which may contain 'scrub' habitat essential to [the Florida scrub jay.]" The letters stated that "[i]t is the Services's position that destruction of scrub habitat will significantly affect this species [*sic*]" and that such destruction "may violate the Act. As a landowner, you are responsible to ensure that actions carried out on your property are not harmful to the scrub habitat or the listed species it supports." *See* Exhibit A which is the text of one of these letters.

> Harm in the definition of "take" in the Act means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

50 C.F.R. § 17.3.

It was the Fish and Wildlife Service's use of this rule that precipitated the *Sweet Home* litigation. This Court's decision clarified the scope of the prohibitions of 50 C.F.R. § 17.3 as compared to the statutory term of "harm." This Court deferred to the Fish and Wildlife Service's discretion and upheld 50 C.F.R. § 17.3 as a proper interpretation of the term "harm." However, the majority imposed a significant limitation on the service's onerous regulation of habitat modification. *Sweet Home*, 115 S. Ct. at 2412 n.9; 2414 n.13.

Specifically, in responding to Justice Scalia's dissent which argued that 50 C.F.R. § 17.3 improperly extends the take prohibition of the Act to the unforeseeable impacts of habitat modification, Justice Stephens wrote for the majority that

> [t]he dissent incorrectly asserts that the Secretary's regulation (1) "dispenses with the foreseeability of harm" and (2) "fail[s] to require injury to particular animals."

Justice Stephens continued saying "the regulation ... is ... subject to ... ordinary requirements of proximate causation and foreseeability" and that "every term in the regulation's definition of 'harm' is subservient to the phrase 'an act which kills or injures wildlife.'" *Sweet Home* 115 S. Ct. at 1414 n.13; 2412 n.9.

Justice O'Connor, in her concurring opinion, argued that Section 17.3 is limited:

> First ... to significant habitat modification that causes actual, as opposed to hypothetical or speculative, death or injury to identifiable protected animals. Second, ... the regulation's application is limited by ordinary principles of proximate causation, which introduce notions of foreseeability.

Sweet Home, 115 S. Ct. at 2418.

Thus, the rule in *Sweet Home* is that habitat modification is prohibited only if it actually kills or injures particular members of an endangered species and it was foreseeable that the modification would have that result. Speculative injury to individual animals not specifically identified or to a population in general will not suffice. However, the Ninth Circuit's decision is inconsistent with this principle and creates great uncertainty among property owners.

B. The Ninth Circuit's Determination That This Timber Harvest Would "Harm" Marbled Murrelet and Constitute a Take Under the Endangered Species Act Has Created Great Uncertainty as to the Correct Standard Under Sweet Home

1. Habitat Modification That Affects Future Breeding of Unspecified Birds Is Not a Violation of the Endangered Species Act Under Sweet Home

The Ninth Circuit ruled that "under *Sweet Home*, a habitat modification which significantly impairs the breeding and sheltering of a protected species amounts to 'harm' under the

ESA." Pet. for Writ., App. A, at 17a. Thus, according to the court, marbled murrelets will be "harmed" and "taken" within the meaning of the Endangered Species Act because some *potential* nesting sites may be removed thereby impairing the breeding behavior and possible breeding success of the murrelet. This ruling creates an untenable situation for land use permitting agencies and property owners. These agencies and property owners are forced to speculate whether the activities they permit or engage in will, in the future, so negatively impact the breeding or sheltering of a protected species as to harm it illegally. Such uncertainty casts a pall over the property rights of agricultural and rural landowners. Thus, the Ninth Circuit's decision should be reviewed to remove the confusion and uncertainty over what land use activities are and are not allowed under 50 C.F.R. § 17.3.

To violate the Endangered Species Act's prohibition against harming a species, as interpreted by 50 C.F.R. § 17.3, the challenged conduct must be demonstrated to "actually kill or injure" particular members of an endangered species. Harm to hypothetical animals or to a population in general is not sufficient. This critical condition precedent of actual harm was expressed throughout the *Sweet Home* opinion. 115 S. Ct. at 2412, 1412 n.9, 2414 n.13, 2415, 2417. Moreover, Justice Scalia's dissent expressly found that the majority's decision interpreted the antiharm regulation, 50 C.F.R. § 17.3, to mean that "habitat modification can constitute a 'taking' but only if it results in the killing and harm of *individual animals*, and only if that consequence is the direct result of the modification." 115 S. Ct. at 2431 (emphasis in original). He continued: "This means that the destruction of privately owned habitat that is essential ... for the *breeding* of butterflies, would not violate the Act, since it would not harm or kill a living butterfly." *Id.* (emphasis in original).

Justice O'Connor's concurrence explained her interpretation of the majority opinion: "That a protected animal could have eaten the leaves of a fallen tree or could, perhaps, have fruitfully multiplied in the branches, is not sufficient under the regulation. Instead, ... the regulation requires demonstrable effect (*i.e.*, actual injury or death) on actual, individual members of the protected species." *Sweet Home*, 115 S. Ct. at 2419. Quite clearly, even habitat modification that actually impairs breeding resulting in some negative effect on the overall population of a species is not an act constituting harm within the meaning of 50 C.F.R. § 17.3.[2] Instead, for the

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[2] Justice O'Connor does part with Justice Scalia in finding, under limited circumstances, that habitat modification that causes impairment of breeding can injure living creatures as opposed to just populations. Justice O'Connor explained that

> [t]o raze the last remaining ground on which the piping plover currently breeds, thereby making it impossible for any piping plovers to reproduce, would obviously injure the population (causing the species' extinction in a generation). But by completely preventing breeding, it would also injure the individual living bird, in the same way that sterilizing the creature injures the individual living bird.

115 S. Ct. at 2419.

This case is not about razing the "last remaining ground," on which the murrelet currently breeds, however. There are still over 65,000 acres of suitable murrelet habitat in public parks and other public lands in northern California alone. Pet. for Writ. at 2. Moreover, on Owl Creek alone, out of 440 of private foreest acres, over 300 acres are not to be

(continued...)

regulation to be violated, injury or death of particular animals like the murrelet must be caused by the habitat modification. 115 S. Ct. at 2418. Habitat modification causing indirect harm to a species by affecting its future breeding, and thus its population, but which has not been shown to actually result in the killing or injuring of any particular animal is not prohibited by Section 17.3 or the Endangered Species Act. The Ninth Circuit's decision, unfortunately, refuses to apply this important principle.

2. Habitat Modification That May Increase the Likelihood of Avian Predations Does Not Constitute Harm That Violates the Endangered Species Act Under Sweet Home

The Circuit Court also concluded that "Pacific Lumber's harvesting plan would likely harm marbled murrelet by ... increasing the likelihood of attack by predators on the adult murrelets as well as the young." App. A at 18a. The court concluded that this increased likelihood of predation constituted imminent future harm adequate to support a permanent injunction under the Endangered Species Act. However, this ruling is inconsistent with *Sweet Home*. First, there was no finding that the harvest plan will actually cause the death or injury of particular existing marbled murrelets, as the court was only able to speculate that the likelihood of avian predation will increase. *Id.* Yet, as was emphasized by Justice O'Connor in her concurring opinion, there is no "taking without actual, as opposed to hypothetical or speculative death or injury." *Sweet*

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[2] (...continued)
touched by the approved harvest. On the 137 acres approved for harvest, only 40% to 60% of the trees are to be cut. Clearly, there are thousands and thousands of acres of protected murrelet breeding habitat that will allow the birds to reproduce.

Home, 115 S. Ct. at 2418.[3] Clearly, 50 C.F.R. § 17.3 requires "demonstrable effect (*i.e.*, actual injury or death) on actual, individual members of a protected species." *Id.* at 2419 (O'Connor, J. concurring).

Second, to establish harm, the plaintiffs must also be able to establish proximate causation. *See id.* at 2414 n.13. Justice O'Connor elaborated on the majority's opinion stating: "Indeed by the use of the word 'actually,' the regulation clearly rejects speculative or conjectural effects, and thus itself *invokes* principles of proximate causation." *Sweet Home*, 115 S. Ct. at 2420 (emphasis in original); *see also* 115 S. Ct. at 2412 n.9. To illuminate this principle, Justice O'Connor reevaluated *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (*Palila II*), the Ninth Circuit decision that had been decided directly contrary to the District of Columbia Circuit Court's *Sweet Home* decision, and concluded it had been wrongly decided. In *Palila II*, the Ninth Circuit had held that "a state agency had committed a 'taking' by permitting feral sheep to mamane-naio seedlings that, when full-grown, might have fed and sheltered endangered palila" birds. 115 S. Ct. at 2420-21. Justice O'Connor reasoned that "[d]estruction of seedlings did not proximately cause actual death or injury to identifiable birds; it merely prevented the regeneration of forest land not currently inhabited by actual birds." *Id.* at 2421.

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[3] In a decision preceding *Sweet Home*, the First Circuit Court of Appeals took a virtually identical position finding that "courts have granted injunctive relief only where petitioners have shown that the alleged activity has actually harmed the species or if continued will actually, as opposed to potentially, cause harm to the species." *American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993).

The Ninth Circuit's line of analysis in this case should fare no better than its *Palila II* conclusion when measured against the principles of *Sweet Home*. The appellate court relied on the speculative testimony of plaintiff's experts as establishing some likelihood of an increase in predation on remaining nesting birds and their young because of the selective harvesting of a limited portion of a 137-acre commercial timber tract. Pet. for Writ., App. A at 17a. Yet there was no showing of actual nesting in Pacific Lumber's 137-acre harvest area, no showing that too few trees would remain in the area to provide shelter, no showing that the significantly mitigated harvest plan approved by the Department of Forestry would lead to any increased risk of harm, and definitely no showing of any actual death or injury to particular members of the protected marbled murrelet species. In short, there was no showing that the selective timber harvest would proximately cause the death or injury of any murrelet.

The Ninth Circuit nevertheless accepted "speculative, and conjectural" harm as an adequate basis for finding an Endangered Species Act violation, even though such a basis was categorically rejected by this Court. *Sweet Home*, 115 S. Ct. at 2414 n.13. Thus, there is no "critical link" between this proposed timber harvest and any actual injury to murrelets. *See Morrill v. Lujan*, 802 F. Supp. 424, 430 (S.D. Ala. 1992). Respondents raised only the possibility of increased future predation and did not show any actual injuries. Thus, the Ninth Circuit's ruling that the proposed harvest of private timber land will harm the marbled murrelet within the meaning of 50 C.F.R. § 17.3 is inconsistent with this Court's interpretation of that regulation in *Sweet Home*.

The Ninth Circuit's acceptance of speculative evidence to establish "harm" casts the property rights of this region's agricultural and rural land owners into uncertainty and should be reviewed by this Court.

II

THE NINTH CIRCUIT'S DECISION VIOLATES THE CONCEPT OF ORDERED LIBERTY

The Framers of the Constitution understood that uniformity of law is necessary to ordered liberty. They decried whimsical public policy and so prohibited bills of attainder, ex post facto laws, and laws impairing the obligation of contracts. Such laws contravene the notion of government impartiality implicit in the social compact.

In *The Second Treatise of Government* § 137, John Locke eloquently explains that the people would not enter into an ordered society without the assurance of preserving their "lives, liberties, and fortunes." Nor would they trade the right to protect themselves and their property in exchange for the peace and quiet of government protection if that government exercised absolute arbitrary power or acted without settled, standing law. John Locke, *The Second Treatise of Government* § 137 (P. Laslett, ed., 1960).

The Ninth Circuit's decision undermines the very notion of an ordered society by failing to protect private rights from arbitrary government action. In effect, the Ninth Circuit has relegated to subservient status the owners of land that theoretically would support the feeding, breeding, or sheltering of protected or potentially protected species.

If the potential for harm equals actual harm under the Endangered Species Act, as the Ninth Circuit decided, there is little to prevent the federal government from exerting absolute, sometimes arbitrary, land use control over private property in habitat areas. Countless private property activities will be subject to government whim if this case is not reviewed and

overturned. The corn farmer who is preparing to harvest may be told by the government to leave his corn on the stock because a protected mouse with diminishing numbers needs the corn for feed, shelter, or to hide from menacing predators. A rancher may be told to fence his cattle or sheep from their only watering hole in order not to scare away protected migratory water fowl that may find the water attractive breeding or foraging habitat. Or a tree farmer may be told he may not harvest even dead and dying timber because it appears to be potential habitat for protected species that are not necessarily using the land for any purpose--but might. The Ninth Circuit decision robs property owners of certainty and security regarding what they can and cannot do with their property. This violates all notions of fairness and undermines the object of our social compact: "The sober people of America are weary of the fluctuating policy which has directed the public councils." THE FEDERALIST, No. 44 at 227 (James Madison) (Bantam Classic ed., 1982).

If this Court does not review and conform the Ninth Circuit's decision to the limits of the regulation as interpreted in *Sweet Home*, the property rights of farmers, ranchers, timber owners, and other rural property owners will be subject to severe overreaching by the federal government in the name of species protection. Regulatory decisions will be subject to whim and caprice. A Fish and Wildlife Service officer merely has to "speculate" to put an owner in the untenable position of having to proceed under total uncertainty and at risk of massive fine and imprisonment for the cutting of a single tree, the filling of a tire rut, or the harvesting of a crop. Such overreaching could leave land owners without economically beneficial or productive options. This Court must not allow such a chaotic situation to undermine our society and way of life.

CONCLUSION

The Ninth Circuit's decision is in utter conflict with the interpretation of the government's species protection regulation by this Court in *Sweet Home*. The decision below, which creates a new rule of law not contemplated by Congress, places into limbo the rights of America's rural property owners. This Court recognized in *Sweet Home* the need for certainty and predictability for landowners whose property might be potential habitat for environmentally threatened species. But the Ninth Circuit has destroyed any possibility of property owners to understand the effect of the Endangered Species Act on their land. This result runs counter to the principle of ordered liberty.

This case should be reviewed to correct the Ninth Circuit's fundamental misconceptions of this Court's *Sweet Home* decision. This case also should be reviewed to guarantee to property owners a system of laws that provides them with the certainty and security to know they can make economic use of their property.

DATED: October, 1996.

Respectfully submitted,

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APPENDIX A

Appendix A

United States Department of the Interior
FISH AND WILDLIFE SERVICE
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Jacksonville, FL 32216

[June 13, 1991]

Lykes Brothers, Inc.
P.O. Box 1690
Tampa, Florida 33601

Dear Gentlemen:

The U.S. Fish and Wildlife Service (Service), in its effort to protect the Florida scrub jay, has been reviewing property records in Highlands County. As a result of the review, you have been identified as owning property which may contain "scrub" habitat, essential to this species. Scrub is defined as a sandy area which supports a dense, but often patchy, layer of woody shrubs, with little or no ground cover. Typical plants which grow here include sand live oak, myrtle oak, inopine oak, and Chapman oak, along with saw palmetto, scrub palmetto, scattered sand pine, and rosemary. This type of habitat may be occupied by Florida scrub jays, a federally listed threatened species. Two other threatened species which may occupy this habitat are the sand skink and the blue-tailed mole skink, which are small lizards.

The Florida scrub jay (*Aphelocoma coerulescens coerulescens*) is a unique bird subspecies found only in Florida. It is located primarily within your area (the Lake Wales ridge) and portions of the east and west coasts of central and south Florida. The scrub jay is threatened by extinction because of habitat destruction resulting from agriculture conversion, commercial

and residential development, or other uses that result in the destruction of scrub habitat.

The Florida scrub jay is protected by the Endangered Species Act of 1973 (Act), and by regulations published in the Code of Federal Regulations. Under the Act, there is a section that protects endangered and threatened species from human impacts. This section, entitled "Illegal Acts," prohibits the "take" of endangered or threatened species. Take is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Harass is defined as an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Harm is further defined as an act which actually kills or injures wildlife. It is the Service's position that destruction of scrub habitat will significantly affect this species. Therefore, any activity that destroys scrub occupied by scrub jays may violate the Act. As a landowner, you are responsible to ensure that actions carried out on your property are not harmful to the scrub habitat or the listed species it supports.

Although this may appear to be a burden, there is a procedure to resolve this conflict. Under the Act, there are two ways private landowners wishing to develop their land can legally "take" a threatened or endangered species, like the scrub jay. The first is through Section 7 of the Act, which is used if any federal permit, authorization, or funding is received to develop the property. In some cases, this involves a permit for wetland fill by the U.S. Army Corps of Engineers, loans through the Federal Housing Administration, or any other similar federal action.

Appendix A

The second alternative is described in Section 10(a) of the Act. In this instance, a permit authorizing "take" can be issued by the Service, provided the applicant accomplishes appropriate conservation measures for habitat protection prior to development activity. The conservation measures are outlined in a document called a Habitat Conservation Plan (HCP), which is a mandatory component of any Section 10(a) permit for taking. An HCP must show that 1) the taking is incidental, 2) impacts to the species will be held to a minimum and unavoidable impacts mitigated, 3) there must be adequate funding for the plan, 4) the taking will not jeopardize the continued existence of the species, and 5) other site specific needs that may develop on a case by case basis.

The Service is interested in developing an HCP for the Florida scrub jay in your area. If you have scrub habitat which you plan to change in some way, you should contact this office for further information on how to get a permit to authorize "take" of scrub jays, or how you may participate in the HCP process. If you have any questions, please call me or Dawn Zattau at 904-791-2580.

These conservation measures are necessary to protect the Florida scrub jay from the possibility of extinction. Because the birds are so dependent on this type of habitat, adequate scrub must be protected from further development to insure the bird's long-term survival. Your cooperation is very much appreciated.

Sincerely yours,

[s] David J. Wesley
David J. Wesley
Field Supervisor